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Supreme Court of the United States

October Term, 1972

No. 71-1193

UNITED STATES OF AMERICA, *Appellant*

v.

TRAVIS PAUL ENMONS, JACKIE J. BENDO, ED WAYNE BARTON AND MILTON RAY WOODWARD

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of Travis Paul Enmons, Jackie J. Bendo, Ed Wayne Barton and Milton Ray Woodward, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

The Government's thesis on this appeal is that it is "extortion" within the meaning of the Hobbs Act, 18 U.S.C. § 1951, for members of a labor union to engage in "violence" in pursuit of a legitimate labor objective, namely, to secure 'higher wages and other union contract demands."

Gov. Br. p. 2. This is the opposite of the Government's description of the crime of extortion in its brief to this Court in *United States* v. *Local 807*, 315 U.S. 521, where it stated:

> "* * * violence used as a means of obtaining a lawful labor union objective is not extortion but simply a breach of the peace or other kindred unlawful act."[1]

Moreover, the Government's position on this appeal is in flat contradiction to its original advice to President Truman when the Hobbs Act was before him for his signature,[2] and to its almost unvarying practice in administering the Hobbs Act since 1946.[3] Finally, the "expansive interpreta-

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[1] Brief for the United States, Nos. 131-132, O.T., 1941, p. 46.

[2] President Truman stated in his message accompanying his approval:

> "The Attorney General advises me that the present bill does not interfere with the rights of unions in carrying out their *legitimate objectives*. He bases this conclusion upon the language of the bill as a separate measure and upon the legislative history." H. Doc. No. 690, 79th Cong. 2d Sess. (Emphasis supplied.)

[3] Before the indictments were returned here and in *United States* v. *Caldes*, 457 F.2d 74 (C.A. 9) there was, according to our information, only a single prosecution under the Hobbs Act in a genuine collective bargaining dispute. That case was brought in 1962, after 15 years in which the sole use of the Hobbs Act had been numerous indictments of unscrupulous officials for attempting to secure payoffs. Yet, since the Hobbs Act became law there have been countless labor disputes in which there was some violence to persons and property; in some cases the violence was serious and the strike notorious. These events could hardly have escaped the attention of the United States Attorneys in the areas in which the strikes occurred or of the Justice Department; many of them became matter of public notice additionally because they resulted in litigation either before the courts or the National Labor Relations Board.

tion of extortion used in the Hobbs Act as urged by the Government * * *,"[4] which wrests that statute out of its context as an anti-racketeering measure,[5] is without precedential support either in decisions under the Hobbs Act, or, since the States have never attempted to utilize extortion laws to enforce their policies against violence in labor dis-

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Inded in *Abbate* v. *United States*, 359 U.S. 187, where the acts committed were remarkably similar to those alleged in the present indictment (*id.* at 189), the Government charged a conspiracy to violate 18 U.S.C. § 1362, which carried a penalty of five years; no count was included under the Hobbs Act, which bears a penalty of twenty years.

In light of this history of prosecutorial quiescence, it is not necessary to invoke principles of desuetude to reject the novel theory of the present prosecution. It is sufficient to recognize that the original understanding of those charged with the administration of the Hobbs Act accords with our views, not those presently espoused by the Government. *United States* v. *Laub*, 385 U.S. 475, 485. Cf. *Norwegian Nitrogen Products* v. *United States*, 288 U.S. 294.

[4] *Caldes* 457 F.2d at 75.

[5] The vast majority of Hobbs Act prosecutions involving labor are directed against union officials who threaten economic action ("force") or violence against an employer in an effort to obtain a payoff for themselves. See e.g., *Stirone* v. *United States*, 361 U.S. 212; *United States* v. *Kramer*, 355 F.2d 891 (C.A. 7); *United States* v. *Varlack*, 225 F.2d 665 (C.A. 2), *Callanan* v. *United States*, 223 F.2d 171 (C.A. 8). The Government's power to pursue this class of cases, and their non-labor counterparts, e.g., *United States* v. *Hyde*, 448 F.2d 815 (C.A. 5), which constitute the core offense delineated by the Hobbs Act, would be in no way affected by affirmance of the decision below. Yet the Government nowhere even mentions their existence, and asserts that the decision below, which is consistent with everything that has gone before, "curtails the reach of the Hobbs Act by limiting its ban on extortionate conduct directed against employers to stiuations where wages are sought for superfluous and unwanted services." Gov. Br. p. 7.

putes, in any state court interpretation of "similar prohibitions elsewhere in the criminal law "(Gov. Br. p. 11).

1(a) This Court has twice recognized that the Hobbs Act was adopted to overrule the limiting construction which this Court, in the *Local 807* case, had placed on the Federal Anti-Racketeering Act of 1934.[6] See *United States* v. *Green*, 350 U.S. 415, 418-419; *Callanan* v. *United States*, 364 U.S. 587, 590-591. The Government agrees that "the elimination in 1946 of [§ 2] of the earlier statute was a direct response to the Court's decision in *Local 807*" (Gov. Br. pp. 8-9). It is therefore of primary importance in determining the scope of that "response" to ascertain precisely what was decided in *Local 807*. Yet the Government gives two, mutually inconsistent interpretations of that case:

In laying the foundation for its argument from the Hobbs Act's legislative history the Government says

> "This exclusionary clause [§ 2 of the 1934 Act] was held in *Local 807* to protect from federal prosecution union members who engaged in threats or acts of violence to coerce employers to meet union wage demands" Gov. Br. pp. 13-14.

But at an earlier point in its brief, the Government had described this holding more accurately

> "In *Local 807*, the Court held that members of a city truck drivers' union, who had sought by threat of violence to procure wages from their employers *for superfluous service*, were explicitly exempted from coverage under Section 2 of the 1934 Act by the lan-

[6] 48 Stat. 979.

guage quoted above." Gov. Br. p. 8, n. 5, emphasis added.

It is only the latter reading which conforms to this Court's understanding of *Local 807* as expressed in *United States* v. *Green*, 350 U.S. at 419 (emphasis added):

> "We held in Local 807 that this exception covered members of a city truck drivers' union offering *superfluous services* to drive arriving trucks to their city destination with intent, if the truck owners refused their offer, to exact the wages by violence.

In *Green* itself the indictment had charged defendants with "extortions" which

> "consisted of attempts to obtain from the particular employer
>
> > 'his money, in the form of wages to be paid for *imposed, unwanted, superfluous and fictitious* services of laborers commonly known as swampers * * * the attempted obtaining of said property from said [employer] as aforesaid being then intended to be accomplished and accomplished with the consent of said [employer], induced and obtained by the wrongful use, to wit, the use for the purposes aforesaid, of actual and threatened force, violence and fear made to said [employer] * * *.'" *Id.* at 417, emphasis added.

Since these charges paralleled the circumstances in the *Local 807* case this Court necessarily held that the indictment charged an offense under the Hobbs Act. The Government's position in the instant case, however, is that the underscored portion of the *Green* indictment was mere surplusage and that violence to obtain money in the form of wages violates the Hobbs Act even if the services to be

performed in return are "genuine and desired." Gov. Br. p. 5.

The court below, unlike the District Court in *Green*, appreciated that "if the wages sought by violent acts are wages to be paid for unneeded or unwanted services, or for no services at all, * * * that such could constitute the extortion prohibited by the Act." JS 8a. But the lower court contrasted that situation with "the type of activity involved here" (JS 8a), which involves violence in support of a demand for wages for "genuine and desired services" (Gov. Br. p. 5).

Since the question on this appeal is whether that distinction is proper, any argument based on the *Local 807* case which disregards the critical circumstance that the defendants in that case had engaged in violence to obtain payment for "superfluous services" can only by misleading. Indeed, once it is understood that the *Local 807* case involved violence in support of a demand for wages to be paid for "superfluous services" there can be no doubt that achievement of the acknowledged purpose of the Hobbs Act—to outlaw the conduct which *Local 807* had sanctioned—does not encompass the prohibition of violence to obtain wages in return for "genuine and desired services."

The narrow ambit of the 1946 amendment is manifest from the very statement of Congressman Hobbs on which the Government relies, and which we agree "aptly reflect the general mood of the legislators" (Gov. Br. p. 14). Congressman Hobbs there explained:

> "This bill is drawn in response to the challenge of the following quotation from the majority opinion [in *Local 807*]:

> 'This does not mean that *such activities* are beyond the reach of Federal legislative control. Nor does it mean that they need go unpunished.'" Gov. Br. p. 14.[7]

The context of the passage Rep. Hobbs quoted from *Local 807* (315 U.S. at 536) leaves no doubt as to what the majority opinion meant by "such activities." In the immediately preceding paragraph of its opinion (*id.* at 535-536) the Court described the union "activities" to which "such" refers—"demands [for] the payment of money regardless of the management's willingness to accept [the] labor."

The colloquy between Mr. Michener and two of his colleagues from which the Government quotes, likewise demonstrates that the Act was not intended "to have [the] broad coverage" the Government now claims (Gov. Br. p. 15), but only to reverse the particular result of the *Local 807* case and to embody Justice Stone's dissent in that case into law. For the asterisks in the Government's brief are its substitute for the following statement by Mr. Michener:

> "Mr. Speaker, I cannot understand how any union man can claim that the conduct described by Mr. Justice Stone is a legitimate union activity. I have confidence that most of the rank and file of labor and my congressional district will so claim."

The "conduct described by Mr. Justice Stone," was that:

> "[The defendants], or some of them, lay in wait for

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[7] Rep. Whittington in the course of the remarks from which the Government quotes at p. 16 of its brief echoed this observation:

> "The Court in that case decided that the statute was not applicable to members of labor unions and the Court really invited Congress to clarify the statute." 91 Cong. Rec. 11913.

> trucks passing from New Jersey to New York, forced their way onto the trucks, and by beating or threats of beating the drivers procured payments to themselves from the drivers or their employers of a sum of money for each truck, $9.42 for a large truck and $8.41 for a small one, said to be the equivalent of the union wage scale for a day's work. In some instances they assisted or offered to assist in unloading the truck and in others they disappeared as soon as the money was paid without rendering or offering to render any service." *Local 807*, 315 U.S. at 539.

And Mr. Justice Stone himself was careful to distinguish between such conduct, which he believed was forbidden by the Federal Anti-Racketeering Act, and union violence directed at legitimate labor objectives:

> "*Even though the procuring of jobs by violence is not within the Act,* and though this includes the 'stand-by' job where no actual service is rendered, the granted immunity, unless its words be disregarded, does not extend to the case where the immediate objective is to force the payment of money regardless of the victim's willingness to accept and treat the extortioner as an employee." *Id.* at 541, emphasis supplied.[8]

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[8] As the Government said in its brief in *United States* v. *Green*, "This opinion is highly pertinent in interpreting the Hobbs Act because its reasoning was adopted by the congressional committee which drafted the amending legislation." Brief for the United States, No. 54, Oct. Term 1955, p. 18, n. 5. For this reason the House Judiciary Committee Report discussing Title I of the bill—which became 18 U.S.C. § 1951—is devoted almost entirely to a reproduction of the majority and minority opinions in the *Local 807* case. H. Rep. No. 238, 79 Cong., 1st Sess., pp. 2-9. See also 91 Cong. Rec. 11907 (remarks of Rep. Fellows), quoting Justice Stone's dissent, and cited at Gov. Br. p. 15, n. 8.

The distinction between the demand for unwanted services as in the *Local 807* case and a demand for *bona fide* wages for work which the employer desires was also drawn by Congressman Hancock. He first said:

> "This bill has been labeled an antilabor bill. That is not true. It is not antilabor in purpose or in fact. This bill is designed simply to prevent both union members and nonunion people from making use of robbery and extortion *under the guise of obtaining wages* in the obstruction of interstate commerce. That is all it does." 91 Cong. Rec. 11900, emphasis added.

Then, after yielding briefly to a colleague, he added:

> "In effect the Supreme Court held that it was the intent of Congress and the meaning of that act that members of Teamsters' Union 807 in New York City were exempt from the provisions of that law when attempting by the use of force or the threat of violence to obtain wages for a job *whether they rendered any service or not.* In my judgment that is a gross misinterpretation of the law and a distortion of the intent of Congress. Of course, it was never the intent of Congress to legitimize crime; nevertheless, the decision of the Supreme Court in the teamsters' case will be the supreme law of the land until the Supreme Court reverses itself, which is not likely, because five of the members of the Court who made that astounding decision are still members of the Court, or until Congress acts to correct and supersede the decision and adopts a new law written in clear and unmistakable language. *That is all this bill does.* We think a mistake was made by the Supreme Court, we are attempting to correct it through enacting a new law which will accurately and definitely reflect the attitude of the Congress, the general public and the honest, law-abiding members of

labor unions." 91 Cong. Rec. 11900 emphasis added.

As just shown, the proponents of the bill repeatedly insisted it was merely intended to cure a "technical defect"[9] in the Anti-Racketeering Act and directed attention to the particular circumstances of the *Local 807* case.[10] The Government nevertheless chooses to characterize their product as a "sweeping response to *Local 807*" (Gov. Br. p. 16). And propelled by this self-generated momentum the Government hastens to the conclusion that its own "sweeping" construction of the Act is implicit in the failures of opponents to amend the bill (Gov. Br. pp. 16-18). This argument lacks merit for several reasons:

First, it overlooks the cardinal rule of construction that the "fears and doubts of the opposition are no authoritative guide to the construction of legislation."[11] "An unsuccess-

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[9] Cong. Rec. 11913 (remarks of Rep. Whittington).

[10] This is the theme sounded by the Congressmen cited at Gov. Br. p. 15, n. 8. Rep. Hoffman, after describing at length the facts of the *Local 807 case,* discussed also a peaceful jurisdictional dispute involving a Teamster Local in Michigan whose conduct he characterized as "extortion." Since such a dispute cannot possibly fit within the bill's definition of "extortion" (and is additionally a peaceful "labor dispute" exempted by what became § 1951(c)), Rep. Hoffman's views of what constitutes "extortion" cannot be attributed to the sponsors of the bill. The sole exception is Rep. Baldwin of Maryland who spoke strongly against labor violence. But he took pains to observe that the violent Baltimore taxicab strike which was his example of that evil "does not pertain to this bill." 91 Cong. Rec. 11918.

[11] *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384, 394. Rather, "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Id* at 395.

ful minority cannot put words into the mouths of the majority and thus, indirectly, amend the bill." [12]

Second, it is not sufficient for the purposes of the Government's argument to put Rep. Marcantonio's words "into the mouths of the majority"; it is necessary to attribute to them a meaning which they do not fairly bear. To be sure, he admonished that the bill would "leave the field now wide open for the prosecution of labor for any activity * * *" (Gov. Br. pp. 16-17). This prophecy has considerable historic interest due to its vindication over 20 years later by the prosecutions in this case and in *United States* v. *Caldes;* but it cannot serve to legitimatize those prosecutions. For though he was not given to understatement, even Mr. Marcantonio did not assent that the bill could *properly* be construed to encompass violence in support of legitimate collective bargaining demands.

Third, since amendments to the bill were opposed because their language was " 'substantially the same as [the exception in the 1934 Act] * * *' " (Gov. Br. p. 17), the only inference which can be fairly drawn from their defeat is that the proponents feared that their approval would have frustrated the narrow objective of overruling the *Local 807* case. That inference is confirmed beyond dispute by the remarks of Rep. Gwynne, quoted at Gov. Br. p. 18, " 'it [the LaFollette amendment] would constitute an open invitation to the Supreme Court to decide that case the same, if it should come before them again * * *.' "

Finally, the Government fundamentally misstates the nature of the Hobbs amendment to the Federal Anti-

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[12] *Mastro Plastics Corp.* v. *Labor Board,* 350 U.S. 270, 288.

Racketeering Act when it suggests that in 1946 "Congress simply delet[ed] the exception contained in the 1934 Act" (Gov. Br. p. 16), and states that the "only concession to the opponents of the statute was the insertion of Section (c)" (Gov. Br. at p. 18). Rather, the original bill was fundamentally changed by adding a specific definition of "extortion."[13] It is for this reason that as the Third Circuit correctly observed: " 'The exemption of certain labor union activities from the coverage of the act can be found in two places." *United States* v. *Sweeney*, 262 F.2d 272, 276, n. 4. As the *Sweeney* court explained, the "two places" are §1951(b)(2) which defines "extortion", and § 1951(c) which excepts activities protected by certain federal labor laws.[14]

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[13] As Rep. Hobbs explained

"The reason we left out section 6 of the Copeland Act is the same reason we left out every word of the Copeland Act. We wiped the whole thing out and substituted a bill that cannot be misunderstood * * * [that] will do the job it is meant to do, which is to prevent interference with interstate commerce by robbery or extortion. That is all we are shooting at. Those words have been construed a thousand times by the courts. Everybody knows what they mean. Therefore, we decline to become involved in a mass of language which the Supreme Court in the Local 807 case held was not sufficient to support a conviction." 91 Cong. Rec. 11912.

[14] We do not rely on subsection (c) of § 1951 in this case; nor do we understand the appellees to do so. Thus, the discussion in *Green* opinion (350 U.S. at 420) quoted at Gov. Br. p. 18-19 is of no relevance here, the Government having properly acknowledged that that discussion deals solely with the § 1951 (c) exception. Moreover, no argument is made herein, as was made in *Green*, "that the Hobbs Act applies solely to extortion that benefits the extortioner" (Gov. Br. p. 10). These references to points which were decided in *Green*, but are not involved here, are a transparent attempt to give foundation to the Government's claim that the decision below is

What was said in the debates allows no doubt that "the evil which Congress sought to correct and prevent"[15] in 1946 was the violent demand for wages in return for which only superfluous services were offered. But at least as important in determining the Congressional will when it enacted the Hobbs Act is "what Congress did not say."[16] During the entire course of the debates no one asserted that violence in the course of *bona fide* collective bargaining negotiations was intended to be covered. Congress must have known "that some disorder is unfortunately quite usual in any extensive or long drawn out strike";[17] and that threats or violence in the context of a legitimate labor dispute were much more frequent than the incidents of racketeering by faithless union officials which are the staple of Hobbs Act prosecutions. If the Committee had intended

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contrary to the "essential thrust" of *Green* (Gov. Br. p. 6). That the *Green* decision provides no authority for the Government's present theory is manifest. As the Ninth Circuit said in *Caldes:*

> "*Green* differs from the case at bar in that it dealt with extortion from an employer in the form of wages to be paid employees for imposed, unwanted and superfluous or fictitious services." 457 F.2d at 78.

Contrary to the contention developed at Gov. Br. pp. 11-12 this distinction of *Green* is entirely sound. This Court's rejection in *Green* of the District Court's reliance on the *ANPA* and *Gamble* cases indicates that the Hobbs Act reaches some labor objectives unregulated by the National Labor Relations Act. It does not follow that the legitimacy of the object pursued is irrelevant under the Hobbs Act.

[15] *United States* v. *Champlin Refining Co.*, 340 U.S. 290, 297.

[16] *Rewis* v. *United States*, 401 U.S. 808, 811-812.

[17] *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F.2d 472, 479 (C.A. 3) cert. denied on this issue, 310 U.S. 655, modified on another issue, 311 U.S. 7.

to hit this wide and familiar target, surely its report would have so indicated, or one of the sponsors would have so stated in the debates, giving as an example of the need for the bill some recent and notorious violent strike.[18] To contend that Congress intended to subject union members who committed threats or violence during an ordinary strike for wages to the extremely severe penalties prescribed in the Act, while avowing that it was only clarifying an anti-racketeering law, is a tacit slander of the legislative process.

(b) As a matter of convenience we began our argument by considering the legislative history of the Hobbs Act. For one of the few areas of common ground between the parties is that this history establishes that the Hobbs Act was passed as a response to this Court's construction of § 2 of the Federal Anti-Racketeering Act of 1934 in the *Local 807* case. But we might just as easily have begun with an examination of the language of the Act, for that language, properly read, sustains our view that the Hobbs Act does not reach all violence, but only violence to achieve an illegal purpose.

"Extortion" is defined in the Hobbs Act to mean "the obtaining of property from another with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of law" (18 U.S.C. § 1951(b)(2)). The Government proclaims that this "language is free from ambiguity and without qualification." Gov. Br. p. 8. That claim is essential to the Government's case since this is a criminal statute and this Court has

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[18] "The silence of the sponsors is pregnant with meaning," *Labor Board* v. *Fruit Packers*, 377 U.S. 58, 66.

repeatedly held that " 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *Rewis* v. *United States*, 401 U.S. at 812, quoted with approval in *United States* v. *Bass*, 404 U.S. 336, 347; see also the cases cited in *Bass*, *id.* at 347 and *United States* v. *Campos-Serrano*, 404 U.S. 293, 297. But the contention that the definition of extortion is unambiguous and unqualified is wholly unwarranted.

The word "wrongful" is clearly one of qualification or limitation; moreover, it can not be ascertained by mere inspection whether that term modifies only the phrase "use of actual or threatened force" or whether it also modifies "violence" and the other means described in § 1951(b)(2). And if "violence" were not otherwise qualified the Government's position in this case would at least be linguistically tenable. On the other hand, if "wrongful" modifies "violence" it follows that the Act was not intended to reach violence to accomplish a legitimate objective. Violence by private persons is almost always unlawful, and therefore "wrongful," if that term is used in its broadest sense. Thus, "wrongful" in the phrase "wrongful violence" serves a function only if it is a term of limitation which characterizes the object being pursued by a violent means.

If the matter were otherwise in doubt, the general rule for resolving such ambiguities in criminal statutes would lead to the view that "wrongful" modifies, and thus qualifies, both "force" and "violence." But there need be no doubt. For Rep. Hobbs explained that "wrongful" was indeed intended to modify the entire phrase: During the debates, Rep. Voorhis put the following question to Rep. Hobbs: "In subsection [b], page 2, there is the

word 'wrongful.' Does that word 'wrongful' apply to the entire s ection?" Representative Hobbs replied, "Yes; it qualifies the whole section." 91 Cong. Rec. 11908. Thus when the language of the statute is read in the light of its sponsors' explication it is clear that an illegitimate object is a necessary element of the offense created by the Hobbs Act. And this is how the Government understood the Act when it framed the indictment in *Green* to charge extortion of the employer's

> " 'money, in the form of wages to be paid for *imposed, unwanted, superfluous and fictitious* services of laborers commonly known on swampers * * * the attempted obtaining of said property from said [employer] as aforesaid being then intended to be accomplished with the consent of said [employer], induced and obtained by the *wrongful use, to wit, the use for the purposes aforesaid,* of actual and threatened force, violence and fear made to said [employer] * * *.'" 350 U.S. at 417, emphasis added.

2. The foregoing demonstrates, both from the language and the legislative background of the Hobbs Act, that Congress determined that a necessary element of the crime of "extortion" as there defined, is that the ultimate purpose pursued by the defendant must be illegitimate. The Act was not intended as a catchall covering any and all violent activity which takes place during an otherwise lawful strike. That demonstration is sufficient to require affirmance of the District Court, for in construing statutes the judiciary's task is to "reconstitute the gamut of values current at the time when the words were uttered." *Woodwork Manufacturers* v. *NLRB,* 386 U.S. 612, 620 quoting Judge Learned Hand. What matters in this case is what Congress meant by

extortion, not what the common understanding of that crime may be But we now show that the Government's assertion (Gov. Br. p. 12) that "the proscription * * * on extortionate conduct applies not merely to the wrongful use of force and threats in seeking illegitimate ends, but also has equal application to actual and threatened force for the purpose of attaining legitimae ends" is unsound generally, as well as in the specific context presented here. The requirement in the Hobbs Act that illegitimate means and ends must conjoin to prove extortion is in the mainstream of the law of extortion.

Extortion deals with the misuse of force to gain an illegitimate end. It does not interdict the use of more than allowable force where the end result is legitimate. Such excessive force is, of course, covered by the criminal law, but not by the crime of extortion. As Judge Wisdom stated in *United States* v. *Hyde*, 448 F.2d 815, 833 (C.A. 5):

> "It is the wrongful use of an otherwise valid power that converts dutiful action into extortion. If the purpose and effect are to intimidate others, forcing them to pay, the action constitutes extortion. Put another way, it is the right to impartial determination of the issue on the merits (*i.e.*, whether to enforce the law or whether to picket or strike) that the victim is deprived of when these actions are taken for the purpose of coercing him into paying."

In other words, the prohibition against extortion is intended to insure that public officials and union officers make their decisions in terms of the responsibilities of their position rather than to further an improper pecuniary interest. Let us put this formulation in concrete terms: The police are authorized to utilize reasonable force to recover stolen

property. If they use excessive force to secure that property they have breached the law, but not the law of extortion. If, on the other hand, they use their "otherwise valid power" to secure a payoff there is a "wrongful use" which subjects them to prosecution for extortion.

So here. Labor unions are authorized to utilize reasonable force (*i.e.*, the methods of economic coercion encompassed by §§ 7 and 13 of the National Labor Relations Act) to secure improved wages, hours, terms and conditions of employment. If they utilize violence to secure those ends they are subject to sanctions under state civil and criminal laws and they commit an unfair labor practice under federal law. But they have not committed extortion, whether under state law or under the Hobbs Act. If on the other hand, they utilize their "otherwise valid power" to achieve illegitimate ends, payment for unwanted and superfluous services or a direct payment to a faithless union official, then both state and federal prohibitions against extortion are violated.[19]

As the Ninth Circuit correctly observed in *United States* v. *Caldes*, 457 F.2d 74, 77-78:

"The use of the term 'extortion' in the Hobbs Act is

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[19] The distinction was well drawn by Judge Van Oosterhout in *Callanan* v. *United States*, 223 F.2d at 173.

"The anti-racketeering statute under which the charges are based has no reference or bearing on action by a labor organization leader, honestly acting and representing members of his organization. It has reference to and bears on interference with interstate commerce by the compulsory payment of money extorted by a labor leader for his own individual enrichment. The act clearly is protective to labor organizations, and labor members, and their membership, as it is to employers."

based on the definition given the term 'extortion' in the New York Penal Code. There the word is defined as '. . . the obtaining of property from another . . . induced by wrongful use of force or fear. . . .' This statute was interpreted in People v. Dioguardi, 8 N.Y.2d 260, 203 N.Y.S.2d 870, 168 N.E.2d 683 (1960). The Court of Appeals construed the term 'force' as used to define extortion, as including coercion, physical violence, destruction of property and economic loss other than that induced by a lawful strike. In *Dioguardi*, the defendant received payments from the victim company which were, in effect, to buy an end to peaceful organizational picketing. The Court stated:

> 'The picketing here . . . may have been perfectly lawful in its inception (assuming it was part of a *bona fide* organizational effort) and may have remained so—despite its potentially ruinous effect on the employer's businesses—so long as it was employed to accomplish the legitimate labor objectives of organization. Its entire character changed from legality to criminality, however, when it was used as a pressure device to exact the payment of money as a condition of its cessation.'

"Thus the New York Court held that the payment out of fear of economic loss became extortion when the aim and objective of the strike was not merely to secure more favorable terms for the laborer but to exact money as a condition of further economic survival. This principle was followed in United States v. Kramer, 355 F.2d 891 (7th Cir. 1966) where a union leader threatened the employer with labor trouble if he was not paid a sum of money, and in United States v. Hyde, 448 F.2d 815 (5th Cir. 1971) where the state attorney general and his aide were convicted of a Hobbs Act violation for threatening life insurance and loan com-

> panies with state action which could lead to the closing of their businesses unless payments were made to the defendant. The Court there held that the 'wrongful use of an official right may be a basis for extortion.'"

Thus, in each of the extortion cases cited by us, and by the Government,[20] the finding of extortion rests on the conclusion that some degree of coercion was utilized for an unlawful purpose. We have found, and the Government has cited, no case which holds, as the Government urges here, that conduct, which would have been lawful if the defendant had sought to achieve his objective by a sanctioned means of coercion, constitutes "extortion" because excessive force was used. Nor have we found, or has the Government cited, any state case in which violence in support of legitimate labor demands has been prosecuted as "extortion."

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[20] The federal cases cited at Gov. Br. pp. 12-13 are wholly remote from this one. First, and most important, none arose in a context in which some use of force would have been lawful; thus, those cases are of no relevance at all in determining whether the use of an excessive degree of force, in a context where some force is allowable is sufficient to constitute extortion. The only authority on that critical point is *Hyde* and it supports our view. While the Government asserts it would have been proper in *Battaglia* (383 F.2d 303) for the defendants to have enforced their demand to use the victim's business establishment as a location for their pool table if it were "enforced by legitimate business pressures" it does not identify the nature of such pressures. None come to mind. Moreover, there is not the slightest suggestion in the opinion that the conviction turned on the nature of the pressures utilized. Again, in *Tropiano* (418 F.2d 1069) the Second Circuit did not distinguish between "the wrongful use of threats to obtain the right to solicit business" and the *rightful* use of threats. *Tropiano* does not even discuss the proper definition of the crime of extortion. Nor does *Glasser* (443 F.2d 994) aid the Government. It is

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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indistinguishable in principle from *Local 807* and *Green* since the use of union glaziers to install glass was an unwanted service just as the swampers were "superfluous" in *Green* and the union truck drivers were not needed in *Local 807*. In sum all three of these cases involve the plain common rackets that were at the forefront of Congress's attention both in the original Federal Anti-Racketeering Act and in the Hobbs Act.